

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TYSON R. GHERE

Claimant

VS.

HUTCHINSON CORRECTIONAL FACILITY)

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Fund

Docket No. 1,044,803

ORDER

STATEMENT OF THE CASE

Claimant appealed the August 3, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Claimant appeared by Mitchell W. Rice of Hutchinson, Kansas. Richard L. Friedeman of Great Bend, Kansas, appeared for respondent and its insurance fund (respondent).

The record is the same as that considered by the ALJ and consists of the transcript of the February 5, 2010,¹ preliminary hearing and exhibits thereto; the transcript of the December 21, 2010, deposition of Dr. Daniel P. Connelly and exhibits thereto; the transcript of the June 16, 2011, deposition of Dr. Daniel P. Connelly and exhibit thereto; the transcript of August 3, 2011, preliminary hearing; and all pleadings contained in the administrative file.

On July 30, 2007, claimant was running in response to an emergency and shortly thereafter his left leg significantly swelled. The parties concur that claimant had vascular problems in the left leg that preexisted the July 30, 2007, incident. Since birth, claimant's left leg was enlarged compared to the right. He had a vascular hemangioma on the left lower back and left leg. Claimant has a condition wherein physical activity can cause the

¹ It appears February 5, 2009, the date reflected on the first page of this transcript as the date the hearing was held, is an error and should be February 5, 2010.

veins in his left leg to fill with blood. In turn, the veins filling with blood results in extreme swelling. Respondent asserts claimant's injury did not arise out of and in the course of his employment. Respondent also contends claimant's vascular condition could have been aggravated by any daily activity and, therefore, is not compensable.

A preliminary hearing was held on February 5, 2010. The ALJ considered the testimony of claimant and medical reports of Dr. George G. Fluter, Dr. Craig S. Heligman and Dr. Gary Jost. However, before he entered an order as to whether claimant's injury was compensable, the ALJ wanted claimant to be examined by a neutral physician. He ordered that claimant undergo an independent medical evaluation (IME) by Dr. Daniel P. Connelly, a vascular surgeon in Shawnee, Kansas. There was a considerable delay in getting the IME report from Dr. Connelly. After Dr. Connelly's report was completed, two depositions of Dr. Connelly were taken and a second preliminary hearing was convened. The ALJ, in an Order dated August 3, 2011, found claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent.

ISSUES

1. Did claimant suffer a personal injury by accident arising out of and in the course of employment? Since birth claimant had vascular problems in his left leg. Specifically, did running during an emergency cause an aggravation of claimant's preexisting vascular condition?

2. If so, was the injury the result of a personal risk or a normal activity of day-to-day living?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant has a history of left lower extremity medical problems. At birth, it was discovered his left leg was longer than the right. He also had a vascular hemangioma in the left leg. In laymen's terms, a hemangioma is an aggregate of small capillaries beneath a thin cover of mature flattened cells. It appears as a dark red or purple spot.

In 1987, claimant underwent a proximal left tibial epiphysodesis procedure, which is an operation to arrest the growth of the tibia. Claimant underwent the same operation to the left femur in 1987. The vascular hemangioma was treated with laser treatments in 1988. In 1999, claimant saw Dr. William Davis, who observed a vascular port wine stain on claimant's left leg. Claimant was diagnosed with dilated veins and varicose veins in the left leg and superficial thrombophlebitis.

Dr. Greg Nanney saw claimant on three occasions in 1999. He diagnosed claimant with phlebitis of the left leg and indicated that claimant should continue using Coumadin, an anticoagulant. Claimant saw Dr. H. Karl Radke several times from February 14, 2002, through October 14, 2003. Dr. Radke indicated claimant had multiple medical problems in the left leg including: lymphadenitis, multiple varicosities, enlarging venous varicosities, edema, superficial thrombophlebitis and varicose veins. On January 8, 2003, claimant complained to Dr. Radke of a ruptured varicose vein with bleeding.

On June 28, 2006, claimant saw Dr. Larry Ensz for a vein in the lower left ankle that was hard and painful. Claimant again saw Dr. Radke on July 5, 2006. He diagnosed claimant with deep vein thrombosis and prescribed Coumadin.

Claimant began working for respondent on July 12, 1998. On the date of his injury, claimant was a sergeant on the outside detail work crew. He was in charge of the grounds keeping and greenhouse detail at the Hutchinson Correctional Facility which required a great deal of standing. One of his duties was to respond to emergencies.

On July 30, 2007, claimant was in his office when there was an officer-needs-assistance call (Signal 30) in the dorm that was 20-40 yards away. Claimant began running toward the emergency and felt pressure in his left leg. At the time claimant was wearing baggy BDU (military style) pants. By the time claimant got to the scene of the emergency, he noticed his left pant leg was skin tight from waist to the ankle. From the time claimant got up to respond to the emergency to the time he noticed his leg was swollen, approximately a minute and a half had passed. Claimant was first taken to the doctor's office at the workplace and then taken to Same Day Care at the Hutchinson Clinic.

Claimant testified that prior to the incident, there was not a noticeable difference between his left leg and his right leg. His left leg is naturally larger than his right. Consequently, the left BDU pant leg would have been tighter, but nothing he would have noticed.

After the July 30, 2007, incident, claimant was taken off work for a month. As a result of persistent swelling, claimant has not worked since May 5, 2009. At the February 5, 2010, preliminary hearing, claimant testified that swelling continues to be a problem. Claimant received temporary total disability payments from the time he left work until December 12, 2009. Claimant testified that prior to this incident, he had never experienced the same type of swelling. Claimant indicated his left leg was operating normally prior to July 30, 2007. He did not have issues with dressing, lacing his boots, driving to work or going to work.

On August 1, 2007, claimant saw Dr. Jeffrey Thode for evaluation of the injury. Dr. Thode indicated claimant's left leg was swollen, but was negative for deep vein thrombosis. His diagnosis was probable pseudo phlebitis due to a possible burst popliteal cyst. Dr. H. Karl Radke saw claimant on August 22, 2007. He indicated left leg edema and an area of

tenderness and hardness, representative of thrombophlebitis. From December 19, 2007, through January 30, 2009, Dr. Curt Thompson performed two endovenous ablations of the greater saphenous vein in claimant's left leg. He also provided claimant with several sessions of left leg sclerotherapy.

Dr. Radke referred claimant to Dr. Gary Jost, who saw claimant for the first time on March 17, 2009. His impression was that claimant probably had lymphatic disease. Dr. Jost stated, "It is my understanding the patient has had no unusual evidence of central venous obstruction or other problems, and I do feel in light of these findings that probably primary lymphedema should be considered. It is probably traumatic since it started markedly after the injury; however, it is possible the patient may have been predisposed to this condition waiting an event."²

Dr. Jost ordered a left leg venogram and two CT angiographies of claimant's left lower extremity and pelvis. The test results will not be set out in their entirety here for brevity's sake. After these tests, Dr. Jost determined claimant has left leg edema. Dr. Jost placed a May-Thurner Syndrome post iliac stent in claimant. He also referred claimant to a lymphedema clinic.

Claimant was sent by his attorney to see Dr. George G. Flutter. The doctor saw claimant on September 15, 2009. Dr. Flutter reviewed claimant's medical records from 2000 through the date of the examination. Dr. Flutter also obtained a history from claimant and physically examined claimant. Claimant reported that his left leg became swollen after he was running in response to an emergency at work. If claimant stays off the left leg, the swelling is controlled. Claimant said his back becomes painful when the leg is swollen and there is an alteration in his gait.

Dr. Flutter's assessment was left lower extremity swelling/lymphedema, left lower extremity pain related to lymphedema, and low back pain related to gait deviations caused by left lower extremity pain and lymphedema. He indicated that within a reasonable degree of medical probability, "... there is a causal/contributory relationship between Mr. Ghere's current condition and the reported injury of 07/30/07."³

At respondent's request, claimant saw Dr. Craig S. Heligman, an occupational medicine specialist, on November 19, 2009. He reviewed claimant's medical records from 1983 through the date of examination. He obtained a medical history from claimant and physically examined claimant. The medical history in Dr. Heligman's report indicates six years prior to the November 2009 examination claimant had surgery for varicose veins in

² P.H. Trans. (Feb. 5, 2010), Resp. Ex. B.

³ *Id.*, Cl. Ex. 1 at 5.

his left leg. Claimant reported no problems since that surgery until running to the emergency.

Dr. Heligman's diagnosis was probable Klippel-Trenaunay-Weber Syndrome (KTWS) with port wine stain, lymphedema and varicose veins in claimant's left leg. He opined claimant's condition is not work related. He noted there was documentation of all three primary findings of KTWS in 1995; that claimant has had the port wine hemangioma since birth; and claimant has had problems with varicose veins for several years prior to 1998. Dr. Heligman also stated claimant may have primary lymphedema or secondary lymphedema due to past vascular interventions. He indicated lymphedema can occur as a result of unintended damage to the lymph vessels during vein surgery or can arise independently of any traumatic or inciting event.

At the February 5, 2010, preliminary hearing, the ALJ indicated that if only the reports of Drs. Flutter and Heligman were in evidence he would deny claimant's request for benefits. However, because Dr. Jost's report indicated claimant's condition was probably traumatic, the ALJ needed additional information on causation. Consequently, the ALJ ordered the IME by Dr. Connelly.

Claimant saw Dr. Connelly on March 29, 2010. However, it was only on August 17, 2010, that Dr. Connelly sent his IME report to the ALJ. In the IME report, Dr. Connelly noted claimant has a litany of left leg problems. However, Dr. Connelly also stated that between the time claimant underwent surgery to shorten his left leg and July 30, 2007, claimant led essentially a normal life. Claimant participated in high school sports and was gainfully employed. He acknowledged claimant was off work in 2006 because of deep vein thrombosis in the left leg. Claimant then returned to work without restrictions. Dr. Connelly stated in his report, "However, sometime during the course of his employment he had an acute exacerbation of his leg swelling which has resulted in significant disability and is currently leaving him unable to perform his work."⁴

Dr. Connelly had his deposition taken on two occasions. On December 21, 2010, he testified that claimant's current problem was venous claudication. The following testimony concerning causation is clear, concise and significant:

Q. (Mr. Rice) I'm just trying to understand your opinion, Doctor. One of the reasons we are here. In Kansas Workers' Compensation you can have a compensable claim if a pre-existing condition that is clearly not work-related is aggravated, accelerated, or intensified by work activities. The judge can decide whether running is a work activity. But in your opinion did the running on July 30th, 2007 accelerate, aggravate, or intensify Mr. Ghere's pre-existing condition?

⁴ Connelly Depo. (Dec. 21, 2010), Ex. 2 at 2.

A. (Dr. Connelly) I think so.⁵

When asked if claimant has reached maximum medical improvement, Dr. Connelly suggested several courses of treatment. He recommended exploring the opening of the popliteal vein behind the knee, possibly opening the iliac vein, use of a lymphedema press and losing weight. Dr. Connelly testified claimant is 100 pounds overweight. He indicated he sees people who have venous problems strictly because they are overweight. Dr. Connelly testified his opinions are within a reasonable degree of medical probability

Dr. Connelly acknowledged that his opinion of the running incident aggravating claimant's preexisting condition is based upon claimant's subjective account of what happened. He testified on December 21, 2010, that swelling from acute significant venous thrombosis can happen within 12-24 hours. If something in the leg hemorrhages, swelling can occur within hours.⁶

At his June 16, 2011, deposition Dr. Connelly was again questioned at length about the time it took claimant's left leg to become swollen. He testified a normal leg would not have swollen as largely as claimant's within a minute and a half. Dr. Connelly indicated claimant went from a swollen leg to a more swollen leg. He testified as follows:

Q. (Mr. Rice) Can you testify within a reasonable degree of medical probability that but for the running he would not be in the condition that he is in today?

A. (Dr. Connelly) Well, that's kind of looking into a -- into a glass ball. He can't do that because the fact is he has a significant medical problem. He has had this for a long time. The natural course of the disease process is progression, and it doesn't necessarily progress in a linear fashion. Something happened here that acutely exacerbated a chronic problem. But had he not done this running? It is very likely that he could have done something that had -- which got the same result whether he was running during work or running in a soccer game or playing with his children. Any one of those events which increases the blood flow into the leg may overcome the abilities of venous drainage of that leg because of his underlying Klippel-Trenaunay.

Q. Okay. And to boil it all down, was the precipitating event in this case the running?

A. This event certainly seems to exacerbate the problem.⁷

⁵ *Id.*, at 9-10.

⁶ *Id.*, at 20-21.

⁷ Connelly Depo. (June 16, 2011) at 9-10.

Dr. Connelly testified that the July 30, 2007, incident permanently aggravated claimant's preexisting left leg condition.

The ALJ's August 3, 2011, preliminary hearing Order is succinct and to the point. Comments made by the ALJ at the August 3, 2011, preliminary hearing explained his decision to find claimant's injury did not arise out of and in the course of his employment with respondent. The ALJ stated:

Because Dr. Connelly repeatedly states in his report and in his testimony that whether Mr. Ghere knew it or not, his leg must have already started to swell before he got up to respond to the Signal 30. If his leg had already started to swell, then whatever had caused the swelling had already begun before he got up to respond to the Signal 30. So for him to have filled his pant leg in a minute and a half, means the process started before he got up to respond to the Signal 30. That's what Dr. Connelly's testimony stands for. It couldn't have happened in a minute and a half, it had to have started before. And if it started before, then the Signal 30 response didn't trigger it. That's my problem.⁸

The ALJ went on to say:

Okay. We come back to, Mr. Ghere's testimony has been everything was just hunky-dory until he got up to respond to the Signal 30. Dr. Connelly says that could not have been. There had to have been some swelling going on for his pants to fill up in a minute and a half, that the swelling process had to have been preexisting, had to have been developing even before Mr. Ghere got up. The swelling didn't go from zero to filling the BDU pants in a minute and a half, that is clearly Dr. Connelly's position and he tries to explain this. Well, Mr. Ghere just didn't know that he was already swollen.

Well, Mr. Ghere is probably the best person in the world to know whether he was already having symptoms before he got up to respond to the Signal 30, and he didn't have any. . . .⁹

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

⁸ P.H. Trans. (Aug. 3, 2011) at 16-17.

⁹ *Id.*, at 23.

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹⁰ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹¹

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹²

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹³ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁴ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁵

¹⁰ K.S.A. 2007 Supp. 44-501(a).

¹¹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹² *Id.*, at 278.

¹³ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁴ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁵ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

“A claimant’s testimony alone is sufficient evidence of his own physical condition.”¹⁶
 “Medical evidence is not essential or necessary to establish the existence, nature, and extent of a worker’s injury.”¹⁷

K.S.A. 2007 Supp. 44-508(d) states:

“Accident” means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker’s right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2007 Supp. 44-508(e) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In the recent case of *Bryant*,¹⁸ the worker was injured while reaching for a tool belt while on a service call and while bending down to weld. The employer raised two

¹⁶ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 95, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001).

¹⁷ *Graff v. Trans World Airlines*, 267 Kan. 854, 864, 983 P.2d 258 (1999).

¹⁸ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

arguments. First, that Bryant already suffered from back pain and the work incidents did not change his condition. Second, any injury Bryant sustained on the job was due to normal activities of day-to-day living. The Kansas Supreme Court in *Bryant* discussed at length the last sentence of K.S.A. 2010 Supp. 44-508(e) (which also is in K.S.A. 2007 Supp. 44-508(e)). The Court cited a number of cases dealing with whether an injury was work related or caused by normal activities of day-to-day living. The Court held:

Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the *[sic]* whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement – bending, twisting, lifting, walking, or other body motions – but looks to the overall context of what the worker was doing – welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

In *Bryant*, the Court rejected both of the employer’s arguments. It concluded Bryant aggravated a preexisting back condition. The Court also found reaching for a tool belt and bending down to weld were not normal activities of day-to-day living. Accordingly, the Court determined Bryant’s injury arose out of and in the course of his employment.

ANALYSIS

Claimant argues running to the emergency aggravated, accelerated or intensified his preexisting condition. Respondent first argues it was unlikely there was an inciting event at work that caused claimant’s injury. Both respondent and the ALJ chose to focus on the time line. The ALJ found that because claimant’s leg swelled up in a minute and a half, the swelling process was preexisting. He concluded claimant’s injury was not work related.

Dr. Connelly was appointed by the ALJ to independently evaluate claimant. The ALJ appointed him to examine claimant because Dr. Jost indicated that claimant’s condition “is probably traumatic since it started markedly after the injury.”¹⁹ Dr. Connelly testified that within a reasonable degree of medical probability that running to the emergency accelerated, aggravated or intensified claimant’s preexisting condition. He also opined that running to the emergency exacerbated claimant’s preexisting condition. When Dr. Connelly gave this opinion, he was aware that swelling caused by lack of blood drainage often can take several hours. Dr. Connelly indicated that when claimant acutely exercised by running, his leg likely went from being swollen to becoming very swollen.

Claimant testified that prior to the incident, there was not a noticeable difference in his left leg. He first noticed the extreme swelling in his left leg while running to the emergency. While this is subjective testimony, it is also uncontroverted testimony. This

¹⁹ P.H. Trans. (Feb. 5, 2010), Resp. Ex. B.

testimony is the basis for Dr. Connelly's opinion that the incident accelerated, aggravated or intensified claimant's preexisting leg condition. The Board finds Dr. Connelly's testimony credible. Therefore, the Board concludes the running incident accelerated, aggravated or intensified claimant's preexisting leg condition.

The next issue to be resolved is whether claimant's injury was incurred while engaged in a normal activity of day-to-day living. Respondent is liable for providing workers compensation benefits only if claimant's injury was work related. The Kansas Supreme Court in *Bryant* directs that the focus of inquiry should be on whether the activity that results in injury is connected to, or is inherent in, the performance of the job.

It is undisputed that one of claimant's job duties was to respond to emergencies. On July 30, 2007, claimant received a Signal 30 call. While running to the site of the emergency, he felt his left leg swell significantly. Running while responding to the emergency was the activity that led to claimant's injury. That activity was an integral requirement of claimant's job. Certainly claimant might have aggravated his preexisting leg condition while running at home or during a non-work-related activity, but that is not what occurred. Applying the guidelines of the Kansas Supreme Court in *Bryant*, the Board concludes claimant's injury was the direct result of a work-related activity, not the result of a normal activity of day-to-day living.

CONCLUSION

1. Claimant suffered a personal injury by accident arising out of and in the course of his employment with respondent. Specifically, on July 30, 2007, while running in response to an emergency call to assist a fellow officer, claimant aggravated, accelerated or intensified a preexisting leg condition.

2. Responding to an emergency is an integral work-related activity. It was that activity that resulted in claimant's aggravation of a preexisting condition. Utilizing the focus of inquiry set out by the Kansas Supreme Court in *Bryant*, claimant's injury was work related, not the result of a normal activity of day-to-day living.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.²⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²¹

²⁰ K.S.A. 44-534a.

²¹ K.S.A. 2010 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member reverses the August 3, 2011, preliminary hearing Order entered by ALJ Moore and remands this claim to the ALJ for further orders on claimant's request for preliminary benefits. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of October, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Fund
Bruce E. Moore, Administrative Law Judge